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No. _____

In the Supreme Court of the United States

JAMES GALDIKAS, ET AL.,

Petitioners,

v.

STUART I. FAGAN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether students' established property interest, through enrollment in and compliance with all requirements of a course of higher education that promises to result in an accredited graduate degree, provides the basis for a finding that Petitioners had a fundamental right to receive the promised benefits of the Governors State University's Master of Social Work Program?

2. Whether the Petitioners' fundamental right to work in their chosen profession was violated by Governors State University's cover-up of the lack of accreditation for the Masters in Social Work Program which prevented Petitioners' licensure as social workers in the state of Illinois?

3. Whether the "shocks the conscience" standard used by this Court in analyzing substantive due process claims for executive action challenges is applicable to deliberations involving non-custodial issues, such as Governors State University's cover-up of the lack of accreditation for the Masters of Social Work Program?

4. Whether Petitioners have a meaningful post-deprivation remedy for purposes of procedural due process, where relief from the state Court of Claims is dependent on appropriations granted through the legislative process and where the Court of Claims' jurisdiction is limited and does not allow consideration of constitutional issues or individual liability as a remedy for constitutional deprivations?

5. Whether the District Court exceeded its authority in ignoring the plain language of documentary evidence and

in substituting its own assumed facts to arrive at summary judgment in favor of Respondents and against Petitioners?

6. Whether it was an abuse of discretion for the District Court to, *sua sponte,* deny Petitioners' unopposed motion to amend the Complaint to personally identify the Respondents initially designated as "unnamed known security guards?"

PARTIES TO THE PROCEEDINGS

Petitioners

The Petitioners are: James Galdikas, Catherine Hansen, Carol Hedgspeth, Ernestine Johnson, Sandra Posluszny, Dianna Waters, Geosina Willbanks-Ross, Maria Andorf, Sherry Anicich, Sue Ashmus, Karen Bartmann, Leianne Biehl, Mary Brice, Thelma Cartwright, Ronald Chew, Daniel Davis, Bryan Dunlap, Jerri Ganz, Kathleen Hubek, Jennifer Jankowicz, John LaMantia, Eugenia Marco, Delores Mays, Jerry Pierson, Amy Skold, Kathryn Stanley, Benita Uti, Amanda Volin, Rhilender Wilson, and Debra Wollek[1]. At all times relevant herein the Petitioners were students enrolled in the Masters of Social Work ("MSW") program at Governors State University ("GSU") and citizens of the State of Illinois and residents of the Northern District. The Petitioners were the Plaintiffs in the U.S. District Court, Northern District of Illinois ("District Court"), and the Appellants in the U.S. Court of Appeals for the Seventh Circuit ("Court of Appeals').

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[1] These Petitioners are classified in the Second Amended Complaint as "Category 1 Plaintiffs." The "Category 2 Plaintiffs" named in the Second Amended Complaint are a subset of the "Category 1 Plaintiffs" comprised of Petitioners who engaged in protected speech which is integral to the First Amendment claims at issue in this case. The "Category 2 Plaintiffs" named in the Second Amended Complaint are: Maria Andorf, Sherry Anicich, Sue Ashmus, Karen Bartmann, Leianne Biehl, Mary Brice, Thelma Cartwright, Ronald Chew, Daniel Davis, Bryan Dunlap, Jerri Ganz, Kathleen Hubek, Jennifer Jankowicz, John LaMantia, Eugenia Marco, Delores Mays, Jerry Pierson, Amy Skold, Kathryn Stanley, Anika Todd, Benita Uti, Amanda Volin, Rhilender Wilson, Dianna Waters and Debra Wollek.

Respondents

The Respondents are: Stuart Fagan, current president of GSU and successor to Paula Wolff; Paula Wolff, president of GSU from September of 1998 to March of 2000; Harry Klein, Bill McGee, Kristi Delaurentiis, Lorine Samuels, Kathleen Field Orr, Jack Beaupre, and Bruce Friefeld, who were appointed and qualified Trustees of GSU, pursuant to 110 ILCS 670/15-10 *et seq.*, at all times relevant herein; Joan Porche, who was the interim director of the MSW Program at all time relevant herein (all of the previously identified parties are collectively known as the "GSU administration"); Albert Berry, Willard Bethel, Debra Boyd, Albert Chesser, Earl Collins, Leon Covington, Earl German, Maurice Hill, David Holt, Robert Houston, Atha Hunt, Hannah Lee, Johnny McDowell, James McGee, Jason Miotke, Thobius Nygonyani, Leora Pedric, Frank Skrtic, and Emmitt Thompson, (collectively "security guards") were duly appointed security guards at GSU at all times relevant herein[2]. The Respondents were the Defendants in the District Court and the Appellees in the Seventh Circuit Court of Appeals.

[2] The specific names of the security guards were unknown at the time of filing the First Amended Complaint and were classified in the First Amended Complaint as "Category 2 Defendants" or "unnamed known security guards."

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PETITION FOR A WRIT OF CERTIORARI

Petitioners James Galdikas, Catherine Hansen, Carol Hedgspeth, Ernestine Johnson, Sandra Posluszny, Dianna Waters, Geosina Willbanks-Ross, Maria Andorf, Sherry Anicich, Sue Ashmus, Karen Bartmann, Leianne Biehl, Mary Brice, Thelma Cartwright, Ronald Chew, Daniel Davis, Bryan Dunlap, Jerri Ganz, Kathleen Hubek, Jennifer Jankowicz, John LaMantia, Eugenia Marco, Delores Mays, Jerry Pierson, Amy Skold, Kathryn Stanley, Benita Uti, Amanda Volin, Rhilender Wilson, and Debra Wollek, (collectively, "MSW students" or "Petitioners"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (the "Court of Appeals").

OPINIONS BELOW

The opinion of the Court of Appeals (App. at 3a)[3] is reported as *Galdikas et al., v. Fagan et al.,* at 342 F.3d 684 (7th Cir. 2003). The Court of Appeals addressed appeals from four orders, which are the subject of this petition. The first order granted the GSU administration's motion to dismiss the MSW students' substantive and procedural due process claims and can be found at 2001 WL 1223539 (Oct. 12, 2001, N.D. Ill.) (App. at 36a). The second and third orders deny the MSW students leave to identify previously unnamed security guards (App. at 47a) and reconsideration thereof (App. at 49a). The fourth order that is the subject of this petition granted the GSU administration's motion for summary judgment on the MSW students' First Amendment claims and

[3] Citations to Petitioners' Appendix shall be cited as "App. at ___ a."

can be found at 2001 WL 570643 (April 16, 2002, N.D. Ill.) (App. at 28a).

STATEMENT OF JURISDICTION

The Court of Appeals' decision was entered on August 15, 2003 (App. at 3a). The MSW students filed a timely petition for rehearing and/or rehearing en banc on August 29, 2003. The Court of Appeals denied the MSW students' petition on September 22, 2003 (App. at 1a).

STATUTORY PROVISIONS INVOLVED

The provisions of 42 U.S.C. § 1983 (App. at 53a), the *Clinical Social Work and Social Work Practice Act*, 225 ILCS 20/9A (App. at 54a), and the First Amendment (App. at 53a), are relevant to this petition and are reprinted herein.

STATEMENT OF THE ISSUES

The Appellate Court's decision in this case conflicts with the decisions of this Court in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), and *Meyer v. State of Nebraska*, 262 U.S. 390 (1923), in that: (1) it fails to recognize the MSW students' fundamental right to established property and liberty interests to contract, to engage in the common occupations of life and to acquire useful knowledge; and (2) fails to apply the deliberate indifference standard to its analysis of the MSW students' substantive due process claims as applied in *County of Sacramento*. 523 U.S. at 834.

In *Meyer*, this Court discussed the liberty interest guaranteed to individuals by the Fourteenth Amendment stating that, "[w]ithout doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to

contract, to engage in any of the common occupations of life, to acquire useful knowledge...and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." 262 U.S. at 399. The GSU administration's conduct deprived the MSW students of fundamental liberties, that is the privilege to contract, to engage in their chosen common occupation, and to acquire knowledge.

In *County of Sacramento*, this Court announced the "shocks the conscience" standard in evaluating substantive due process violations in the executive setting. 523 U.S. at 834. This Court's opinion in *County of Sacramento*, suggests that if a state actor has sufficient time to deliberate, he is liable if he is deliberately indifferent to a plaintiff's well-being. *Id.* at 850-51. This Court's opinion did not limit the application of the deliberate indifference standard to custodial settings. As this Court explained, deliberate indifference applies in custodial settings because such settings provide the opportunity for reflection and unhurried judgments. *County of Sacramento*, 523 U.S. at 853. Similarly, in this case, the GSU administration had the opportunity to deliberate. Indeed, the MSW students were deceived for a period of approximately three years regarding the viability of the graduate program for which they had contracted. The fact that the GSU administration knew its MSW Program was not capable of accreditation, but told its students otherwise, deliberately and with knowledge of its falsity, falls within the limits of an executive setting for which a "shock the conscience" analysis can be applied.

Moreover, the Appellate Court's decision failed to take into consideration that Petitioners had no meaningful post-deprivation remedies under state law and therefore, their procedural due process rights were violated by Respondents.

Although the Petitioners filed a complaint in the Illinois Court of Claims, that Court does not have jurisdiction over constitutional claims. Additionally, the Illinois Court of Claims does not provide a meaningful post-deprivation remedy in that there is no means of reviewing the substantive aspect of Court of Claims' decisions. Further, Petitioners are not guaranteed satisfaction of awarded damages even if they prevail in the Court of Claims because the Illinois legislature must specifically appropriate funds to pay the claims of prevailing parties. Accordingly, the Appellate Court's failure to consider the limitations and inadequacies of any possible post-deprivation remedies available to Petitioners, was erroneous. Finally, an action in the Court of Claims does not address individual liability or punitive damages for deliberate violations of federal constitutional rights.

Furthermore, the Appellate Court should have reversed the trial court's granting of summary judgment on Petitioners' First Amendment conspiracy claims given that there are genuine issues of material fact with regard to those claims. These claims should have been submitted to a jury for determination. The Court abused its discretion in assuming facts not in evidence. Petitioners presented documentary evidence to support the GSU administration's and security guards' liability. Accordingly, because there are genuine issues of material fact with regard to Petitioners' First Amendment retaliation and conspiracy claims, those issues should have been submitted to a jury for determination.

A court must deny summary judgment when a genuine issue of material fact remains to be tried. Additionally, all evidence must be construed in the light most favorable to the non-moving party. Therefore, the trial court did not have the discretion to grant Respondents' summary judgment on the basis of assumed facts. Accordingly, Petitioners' First

Amendment relation claims should have been resolved by the factfinder.

Finally, the District Court, with a *sua sponte* order, caused undue prejudice to the Petitioners by foreclosing them from personally identifying initially designated "unnamed known security guards."

STATEMENT OF FACTS

A. Respondents Failed to Provide MSW Degrees from Accredited Program as Promised

All Petitioners paid tuition to GSU in return for receipt of graduate credits that they were led to believe would satisfy Illinois licensing requirements for social workers, pursuant to the *Clinical Social Work and Social Work Practice Act*, 225 ILCS 20/9A.[4] The GSU administration solicited Petitioners and others to the Program, promising students that they would graduate from a fully accredited Program and would be able to become licensed social workers in the State of Illinois. However, the Program was never accredited and the MSW students could not become social workers in the State of Illinois, contrary to the Respondents' misrepresentations made at the time of the solicitation.

[4] After GSU failed to obtain accreditation of the MSW Program (and after GSU led MSW students to believe their studies would lead to a MSW degree from an accredited program for approximately three years), the Illinois General Assembly passed legislation allowing the MSW students to become licensed social workers temporarily until December 31, 2004. The statute further provides a mechanism for students to become permanently licensed if they complete "supplemental coursework" either at GSU if accreditation is achieved prior to December 31, 2003, or at another accredited university after that date. 225 ILCS 20/9.5.

The GSU administration claimed that the MSW Program was "approved" by the National Council of Social Work Education (the "CSWE"), whose approval is necessary for a program's graduates to satisfy licensing requirements for social workers in Illinois. At no time was the MSW Program approved to become accredited or was it ever accredited by the CSWE. Nevertheless, the GSU administration defendants caused to be published statements claiming that the MSW Program "would be approved," "was approved" or was "eligible to be approved" by the CSWE. The practices of solicitation and misrepresentation continued from September of 1997 through and including December 31, 2000, all the while during which GSU collected tuition from Petitioners.

The GSU administration defendants caused to be hired unqualified and unapproved faculty members and directors, and maintained an inadequate curriculum in social work education knowing that their actions would cause the Program not to be accredited. After approximately three years, during which the MSW students were led to believe their studies would lead to a MSW degree from an accredited program, on or about December, 2000, two weeks before the senior class graduation, the GSU administration first informed the students enrolled in the MSW Program that they would be graduating from a degree program which would not lead to licensure. Thereafter, the GSU administration terminated the MSW Program.

B. Respondents Prevented Petitioners from Addressing Accreditation Issues and Retaliated Against Them for Speaking Out

On December 5, 2000, the MSW students congregated to address suspicions that GSU was devoid of accreditation for the MSW Program; GSU administration defendant President

Fagan was asked to attend. At the meeting Fagan confirmed Petitioners' suspicions. On December 15, 2000, students appeared at a Board of Trustees' meeting. They sought to articulate their frustrations to the Trustees regarding the failure of GSU to obtain the promised accreditation for their Program. Petitioners illustrated their concerns on picket signs which were held aloft at the Board Meeting and at the meeting's end when they sought to speak with Fagan. The administration and the Board were unresponsive. Thereafter, the MSW students reached out again with their concerns to the Trustees and the administration at the on-campus holiday party which was open to faculty, staff and students. Once again the GSU administration was unresponsive. On January 12, 2001, the Trustees held an executive closed session meeting at which the sole issue of discussion was the MSW Program. On January 18, 2001, Albert Chesser, Director of Public Safety, sent Fagan a communication addressing the issue of potential protestors and/or disturbances at an upcoming Town Meeting and alumni event to be held on January 27, 2001. Further communication was exchanged on January 25, 2001, when Chesser wrote to Fagan with specific details about GSU's calculated plans to control and limit access of the MSW students to the events at GSU to be held on January 27, 2001.

On or about January 27, 2001, GSU hosted a Town Meeting, Alumni Networking Reception and Dinner. Certain Petitioners received invitations in the U.S. Mail to attend the events. The invitation to the Town Meeting announced that "Stuart J. Fagan and the University's Strategic Planning Committee cordially invite Governors State University Alumni to Participate in a Town Meeting ...come and discuss your ideas and hopes about the future of the University."

Some of the Petitioners appeared at the events to protest the actions complained of in this lawsuit with pickets and signs, in a peaceful and undisruptive manner. Other Petitioners went to GSU on January 27, 2001, to meet with Illinois State Senator Debbie Halvorson with whom they made previous arrangements to meet and discuss the MSW program at the Senator's suggestion. Among the Petitioners present, only a few of them had signs and some Petitioners merely stuck their signs in the snow outside the building. The general protests were incidental to the main purpose which was to attend a meeting with Senator Halvorson to discuss the lack of accreditation for the MSW Program.

The GSU administration, in concert with security guards, excluded the Petitioners from the publicly supported grounds of GSU and ordered them to cease and desist any peaceful protesting and picketing. Petitioners were not allowed inside the building initially. When they were finally allowed into the building they were barred from bringing their signs inside. Once inside, Petitioners were not permitted beyond the atrium. The MSW students were not allowed to go to the bathroom, to the library or to their mailboxes. These restrictions occurred after the chief security guard was given instructions from a white Caucasian male who appeared to be his supervisor.

Further, certain Petitioners observed a table located in the lobby with a sign reading "walk-in registration" but were not permitted to register or attend the event despite the fact that there were 488 individuals who were "no shows" to the events. The GSU administration canceled academic classes, closed the GSU library, and excluded Petitioners from being on the GSU premises. Certain individuals who were identified as not being MSW students were permitted access to the building beyond the atrium. However, the MSW

students were herded into a small area and restricted from enjoying the benefits of GSU, such as use of classrooms, the library, the bathrooms, and the public thoroughfare.

REASONS FOR GRANTING THE WRIT

A. Respondents Violated Petitioners' Substantive Due Process Rights

The Court of Appeals' decision failed to recognize a fundamental right not to be deprived of an established property interest in the right to completion of a bargained-for degree of higher education. This Court assumed such a fundamental right to exist in *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985), as a natural corollary to the right to work discussed by this Court in *Meyer v. State of Nebraska*, 262 U.S. 390 (1923). Moreover, in its analysis, the Court of Appeals failed to apply the "deliberate indifference" culpability standard when analyzing whether the GSU administration's conduct "shocks the conscience" in accordance with the substantive due process deprivation standard of review established in *County of Sacramento v. Lewis*, 523 U.S. at 834.

As recently as June 2003, this Court "reaffirmed the substantive force of the liberty protected by the Due Process Clause." *Lawrence v. Texas*, 123 S.Ct. 2472, 2481 (2003). These protections include personal decisions relating to education. In *Casey v. Planned Parenthood of S.E. PA.*, 505 U.S. 833, 851 (1992), this Court interpreted the Fourteenth Amendment's substantive due process clause to protect certain fundamental rights and "personal decisions relating to ... education." Education provides the foundation for a successful democratic structure, as was explicitly recognized by this Court in *Brown v. Bd. of Educ.*, 347 U.S. 483, 493

(1954), where this Court elevated the importance of education in our democratic society. Although this Court has opined that the **right** to an education is not a fundamental right, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), this Court has analyzed governments' obstruction of established or extended rights, no matter how gratuitous, as substantive deprivations. *Lawrence*, 123 S.Ct. at 2481.

Further, the list of fundamental rights and liberties afforded protection by the substantive due process clause is not static. Indeed, the fluidity of the concept is apparent in cases addressing substantive due process rights. This Court has recognized that there is no bright line that cuts individuals off from substantive due process protection. *See, County of Sacramento*, 523 U.S. at 834. In fact, as recently as 1990, this Court held that a competent person has a protected right to refuse lifesaving hydration and nutrition. *Cruzan v. Dir. Mo. Dept. of Health*, 497 U.S. 261, 279 (1990). This discrete crevice of protection exemplifies the unique reach of substantive due process. Through *Cruzan*, the law allows a person a substantive due process right to reject earthly sustenance. *Id.* Equally compelling is an individual's right to embrace earthly existence and aspire to reach self-actualization through work and professional challenges. Petitioners should be afforded substantive due process rights to insure against deprivation of a promised professional licensure.

Although the case of *San Antonio Indep. Sch. Dist.*, 411 U.S. at 35, holds that education is not among the rights afforded explicit or implicit protection, in *Regents of the Univ. of Mich.*, which was decided twelve years after *San Antonio Indep. Sch. Dist.*, this Court assumed the existence of a constitutionally protected right in a university student's continued enrollment in a public institution. *Regents of the*

Univ. of Mich., 474 U.S. at 223. The interest in education dates to the inception of the first university in the United States, then Harvard College, in 1636, even pre-dating the drafting of our Nation's Constitution. "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Bd. of Regents of State Colls. v. Roth,* 408 U.S. 564, 577 (1972).

The Appellate Court failed to address the broader fundamental rights at issue and chose to shrink the analysis to fit in with a strict interpretation of *San Antonio Indep. Sch. Dist*. The MSW students had secured a constitutionally grounded property right in the MSW program, having been matriculated and enrolled. Subsequently, the GSU administration knowingly and willfully deprived them of this property right. Relying on *San Antonio Indep. Sch. Dist.*, the Appellate Court too narrowly found that the MSW students did not have a fundamental right to their accredited degrees as promised by the GSU administration. The right that the MSW students sought to vindicate was their established right to a **promised** accredited degree that had been arbitrarily withdrawn. Unlike cases in which the property right has not already been established, these students suffered the arbitrary and capricious theft of something for which they had contracted, based on the belief that it constituted valuable property.

Furthermore, the GSU administrations' conduct deprived the MSW students of a fundamental liberty, that is the privilege to work, a privilege long recognized at common law as essential to the orderly pursuit of happiness by free men. *Meyer*, 262 U.S. at 399 (1923). The Appellate Court failed to address the broader fundamental rights at issue in this case and chose to shrink the analysis to fit in with a strict

interpretation of *San Antonio Indep. Sch. Dist.* Instead, the Appellate Court should have looked more carefully at *Lawrence* in which this Court reaffirmed the prohibition against government's interference with personal choice. The governmental actions here interfered with the MSW students' fundamental rights to acquire useful knowledge and to become gainfully employed. Such interference provides the basis of a constitutional deprivation and the MSW students should have been allowed to proceed in the Court below.

The absence of accreditation of the MSW Program deprives Petitioners of their ability to work. The GSU administration promised the MSW students that the MSW Program was approved by the CSWE to become accredited and Petitioners would graduate with degrees accredited by the CSWE. Notably, it was the GSU administration's failure to: (1) take steps to cause the MSW Program to become approved or accredited by the CSWE; (2) hire individuals who had the qualifications necessary to allow the Program to become accredited; and (3) maintain an adequate curriculum in social work education knowing that such actions would cause the Program not to become accredited. Therefore, the Court of Appeals' decision ignored this Court's ruling in *Lawrence* and refused to consider the GSU administration's denial of the MSW students' fundamental right to work.

Even if the Appellate Court did not consider Petitioners' fundamental right to a continuing education or fundamental right to work to have been violated, the Appellate Court should have found that the Petitioners' substantive due process right were violated under the "shocks the conscience" standard.

Just as the Appellate Court too narrowly determined, and therefore erred by stating the MSW students were not

deprived of a "fundamental" right, the Appellate Court also was unduly limiting in its analysis of whether the GSU administration's egregious conduct "shocks the conscience." Courts must undertake an exact analysis of circumstances to determine whether an abuse of power should be condemned as conscience shocking. *County of Sacramento*, 523 U.S. at 850 (stating that "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another... substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking").

As this Court has explained, the kind of conduct that "shocks the conscience" is at the far end of the culpability spectrum, albeit subjective on a case-by-case basis. *Id.* at 834. The evolution of the collective conscience makes it important to analyze substantive due process on a particularized basis. It follows that shock value should be a jury question. It seems plain error for a judge or panel of judges to deprive the MSW students of the right to plead before a group of unbiased citizens to ask them whether deliberate deception and calculated fraud (employed by the GSU administration regarding the status of accreditation of the MSW Program, and ultimate deprivation of the students' ability to receive valuable degrees), shocks the conscience. In *County of Sacramento*, this Court states that "[w]hile the measure of what is conscience shocking is no calibrated yardstick, it does... 'point the way.'" 523 U.S. at 847. In *County of Sacramento*, this Court applied the "shocks the conscience" test to determine whether the plaintiffs' substantive due process rights were violated.

Further, in *County of Sacramento* this Court suggested that conduct falling between intent and negligence on the culpability spectrum "may be actionable under the Fourteenth

Amendment." 523 U.S. at 849-50. This Court's opinion in *County of Sacramento*, suggests that if the state actor had sufficient time to deliberate, they are liable if they were deliberately indifferent to a plaintiff's well-being. *Id.* at 850-51. As in *County of Sacramento*, the "deliberate indifference" standard should have been applied to this case.

There is not any conceivable scenario which would warrant the GSU administration's intentional deception with regard to the accreditation of a Program in which scores of students were enrolled, led by the belief that they would be gaining a valuable education preparing them for the opportunity to be hired as licensed social workers. The GSU administration engaged in arbitrary, injurious conduct unjustified by any governmental interest.

The actions of the GSU administration fall squarely within the "deliberate indifference" definition as delineated by this Court. The GSU administration's callous disregard about the status of accreditation of the MSW Program created an obvious danger in that the school admitted students to the Program and allowed students to continue in the Program before GSU qualified for accreditation "eligibility" status despite repeated warnings from the CSWE. Further, the GSU administration's conduct at issue here was widespread. It affected over eighty students and spanned a period of approximately three years. Once the truth of the lack of accreditation was revealed, the shocking aspect of this case includes the GSU administration's uniform refusal to take any action to remedy the MSW students' injuries.

B. Respondents Violated Petitioners' Procedural Due Process Rights

In its opinion, the Appellate Court found that "plaintiffs arguably possessed a property interest in an accredited degree." *Galdikas v. Fagan*, 342 F.3d 684, 692 (7th Cir. 2003) (App. at 17a). Further, the Appellate Court found that "plaintiffs' complaint states a sufficient deprivation caused by the defendants." *Id.*, at 693. The Court then determined the plaintiffs were free to seek a relief in state court under numerous legal theories and therefore plaintiffs had meaningful post-deprivation remedies. However, the Appellate Court's opinion failed to adequately consider that no meaningful post-deprivation remedies exist under state law.

The MSW students are not required to limit themselves to state law remedies which would not redress violations encompassing constitutional torts. *See Patsy v. Bd. of Regents*, 457 U.S. 496, 501 (1982). In *Patsy*, this Court considered whether exhaustion of state administrative remedies is a prerequisite to an action under 42 U.S.C. § 1983. *Id.* at 498. Congress has assigned the roll of protecting constitutional rights to federal courts. Because the Petitioners' claims are premised on federal law, namely Section 1983, exhaustion of state judicial remedies is not required. Simply put, Petitioners have no state remedy for a deprivation of federal constitutional rights.

On December 5, 2001, Petitioners filed a Complaint in the Illinois Court of Claims alleging numerous state causes of action, including promissory estoppel and common law fraud. Ill.Ct.Cl. Docket No. 02 CC 2854. The Illinois Court of Claims has exclusive jurisdiction in matters involving claims against the State founded upon any law of the State of Illinois

and claims against the State founded upon any contract entered into with the State. 705 ILCS 505/8. Notably however, [i]ssues of constitutionality are outside the jurisdiction of the Court of Claims. *Smart v. State of Illinois*, 48 Ill.Ct.Cl. 38 (1996) (claimant alleging due process violations). Accordingly, Petitioners do not have a meaningful post-deprivation remedy in state court because the Illinois Court of Claims does not have jurisdiction over constitutional claims, which as described above, were overlooked by this Court.

Furthermore, there is no means of reviewing the correctness of a decision by the Court of Claims based upon the merits of a case. *See Reichart v. Court of Claims of the State of Illinois*, 786 N.E.2d 174 (2003). A Court of Claims' decision can only be reviewed as to whether there were deprivations of due process by the Court of Claims. Therefore, Petitioners are deprived of any *de novo* appeal process in the Illinois Court of Claims or its successor. But in federal court, Petitioners have an appeal process available to them.

Additionally, even if Petitioners ultimately prevail in the Court of Claims, they are not insured satisfaction of awarded damages. The legislature must make a specific appropriation to pay the judgment of a prevailing party after approval by the Court of Claims. *See Preston v. Thompson et al.*, 565 F. Supp. 294, 301 (N.D. Ill. 1983); *Branch-Nicoloff Co. v. State of Illinois*, 40 Ill.Ct.Cl. 252 (1988) (legislature failed to appropriate funds pursuant to Court of Claims award). In federal court, plaintiffs are entitled to seek enforcement for damages awarded without legislative appropriation. By contrast, the Illinois Court of Claims does not provide an adequate post-deprivation remedy enforcement process.

Further, "it appears that the wheels of justice do not always turn so fast [in the Court of Claims]." *Preston*, 565 F.Supp. at 302. Although Petitioners filed their Complaint in the Court of Claims on December 5, 2001, their case has been, and continues to be, generally continued since March 11, 2002, to the present. Further, the remedies available in federal court differ from those available in the Illinois Court of Claims. Specifically, attorneys' fees available to prevailing plaintiffs in federal litigation are not available to plaintiffs in the Illinois Court of Claims. Therefore, Petitioners will be required to assume full responsibility for payment of attorneys' fees or surrender their rights to proceed on viable claims. Accordingly, this Court should grant the Petition because no meaningful post-deprivation remedies exist under state law.

C. Respondents Conspired and Retaliated Against Petitioners for Exercising First Amendment Rights

With regard to Petitioners' First Amendment conspiracy claims, the Appellate Court stated that a reasonable jury could not infer that the Board of Trustees participated in a plan to prevent the Petitioners' protest. *Galdikas*, 342 F.3d at 695; (App. at 20a). The Appellate Court's decision fails to recognize the documentary evidence that established a closed meeting of the Board of Trustees for which the sole agenda item was the MSW Program and the written memoranda that followed closely after the meeting. The memos discussed plans to quell demonstrations by the MSW students at the upcoming alumni event. Such documentation creates genuine issues of material fact with regard to Petitioners' First Amendment conspiracy claims, thus requiring those issues to be submitted to a jury for determination.

Further, the Appellate Court found that even under a public forum analysis, Fagan authorized reasonable, content-neutral time, place and manner restrictions. *Galdikas*, 342 F.3d at 696; (App. at 22a-23a). In so deciding, the Appellate Court failed to construe all facts in favor of the Petitioners. *See Dersch Energies, Inc., v. Shell Oil Co.*, 314 F.3d 846, 854 (7th Cir. 2002). It was improper for the trial court to grant summary judgment when there are genuine issues of material fact in dispute. Those facts should be submitted to a jury for determination.

The genuine issues of material fact in dispute include facts supporting the contention that Fagan, as President of GSU, actually articulated the order with respect to excluding the MSW students from the grounds of GSU on January 27, 2001, when GSU hosted a town meeting, alumni networking reception and dinner. In a memorandum dated January 18, 2001, from Albert Chesser, Director of Public Safety, to Fagan, Chesser stated, "[c]ampus access will be open ..." This memo shows that there was initially no plan to close or restrict student access to the January 27th events. In a subsequent memo from Chesser to Fagan, dated January 25, 2001, Chesser addressed at length a possible protest by the MSW students. In fact, the memorandum focused on plans to bar MSW students from protesting. Significantly, Chesser does not independently suggest in either memorandum that the students should be barred from bringing their signs into the atrium. Someone issued an order barring the MSW students from bringing any signs into the building. It remains a question of fact as to whether Fagan or the Trustees participated in such orders or in any part of the plan to restrict the MSW students' access to campus – a question acknowledged by Respondents.

The memoranda are also significant in that Chesser directed them to Fagan. The foregoing issues of fact require credibility determinations to decide whether or not Chesser and/or Fagan are lying about the assertions that Fagan never received or read Chesser's memos and whether Fagan and the Trustees were participants in the plans to set up security measures for the January 27, 2001 events. Accordingly, genuine issues of material fact exist with regard to Petitioners' First Amendment conspiracy claims, thus requiring those issues to be submitted to a jury for determination.

Significantly, the Appellate Court found that Petitioners' conduct was constitutionally protected. *Galdikas*, 342 F.3d at 697; (App. at 25a). Although, the Appellate Court acknowledged that by proving a chronology of events through indirect evidence, a retaliation claim can be established, *Id.*, the Appellate Court nonetheless determined that summary judgment was properly granted to Respondents on the Petitioners' retaliation claims. *Id.* The conclusion is not supported by facts.

GSU qualified as a public forum during the alumni events on the date of January 27, 2001. *See Widmar v. Vincent*, 454 U.S. 263, 277 (1981). Speakers cannot be excluded from a public forum absent a compelling governmental interest. *Cornelius v. NAACP*, 473 U.S. 788, 800 (1985). According to the invitation to events being held at GSU on January 27, 2001, the mission of the town meeting was to "discuss your hopes and ideas about the future of the University." The invitation to the events supports the notion that the town meeting was a public forum.

In the case of *Widmar v. Vincent*, this Court held that university facilities made generally available for student group meetings were designated public forums. 454 U.S. 263, 277

(1981). Several Petitioners were GSU alumni and received invitations to the alumni events. Therefore, the restriction denying Petitioners entry to the town meeting, which was open to the local citizenry, was not compatible with GSU's mission, nor was the restriction compatible with the mission of a town meeting to serve as a forum for public discussion.

Additionally, GSU's restrictions excluded only Petitioners and not other individuals from the town meeting. There is no evidence that anyone other than Petitioners was excluded from attending the town meeting. Imposing limitations on a specific group of individuals carrying a message viewed by some as unflattering is plainly contrary to ordinary First Amendment principles. Further, Petitioners were not only denied access to the alumni events at GSU, they were not allowed to protest in the atrium of GSU with their picket signs.

There is evidence that the Respondents' actions in allegedly closing the library, denying access to the bathrooms, and denying entrance to common areas at GSU were in retaliation against the MSW students for speaking out and delivering an unflattering message regarding the GSU administration. Individuals who identified themselves as being non-MSW students were permitted beyond the atrium. Fagan was involved in written communication relating to keeping the MSW students off campus on January 27, 2001. The Trustees and Fagan all met in closed session and discussed the MSW students just prior to the January 27, 2001 events. Lastly, all of the security guards were gone from GSU by 6:00 p.m. on January 27, 2001, after Petitioners left the campus, thus diminishing the GSU administration's claims that beefed up security was necessary due to the large number of attendees. Indeed, at 6:00 p.m., even though the MSW students were gone, all of the alumni attendees were still on

campus. Security should have remained until the event's end, but instead security vanished shortly after the MSW students left. All of this evidence creates questions of fact regarding whether the Respondents retaliated against the Petitioners for speaking out against them. These questions of fact should have been submitted to a jury for determination. Therefore, the Appellate Court should have reversed the trial court's order granting the Defendants' Motion for Summary Judgment on the Petitioners' First Amendment retaliation claim.

Further, regarding the Trustees, clearly the chronological significance of the closed session meeting on January 12, 2001, which was in close proximity to the lock down of the campus, is sufficient to present a question of fact as to whether the Trustees knew and participated in the decision to keep the Petitioners away from the campus in order to prevent them from speaking out on a matter of public concern. Therefore, because there is a genuine issue of material fact as to whether Respondents retaliated against Petitioners for exercising their First Amendment rights, Petitioners' First Amendment claims should have been allowed to proceed in the Court below.

D. Abuse of Discretion Caused Undue Prejudice

Petitioners' initial Complaint designated certain defendants as, "unnamed, known security guards." Those security guard defendants participated in the challenged conduct by excluding certain Petitioners from the publically supported grounds of GSU. On November 8, 2001, Petitioners sought leave, among other things, to identify the individuals named as "unnamed, known security guards" whose identity was ascertained through discovery. The District Court denied the MSW students' Motion to Identify the Unnamed, Known

Security Guard Defendants and denied Plaintiffs' Motion for Reconsideration of the Court's Ruling Denying Leave to Identify Defendants Previously Named as "Unnamed, Known Security Guards." It was manifestly unjust for Petitioners to be deprived of their right to seek relief against named security guard respondents whose identification data was within the control of the Respondents and was diligently sought by Petitioners.

On the day Respondents filed a motion to dismiss, Petitioners served Respondents with an Initial Interrogatory seeking disclosure of the names of the security guards. While the Motion to Dismiss was pending, Respondents did not respond to the interrogatory. On October 16, 2001, approximately one week after the District Court had ruled that the First Amendment claims would not be dismissed, Respondents provided to Petitioners 19 names responsive to Plaintiffs' Initial Interrogatory. Further, Respondents' counsel advised that he would accept service for the security guards and so advised the District Court in Plaintiffs' Motion for Leave to file a Second Amended Complaint. Further, in their response to Plaintiffs' Motion for Leave To File Second Amended Complaint, Respondents referred to the naming of the security guards as a "technical amendment" and raised no opposition to such amendments.

In ruling on Respondents Motion to Dismiss, the District Court stated that:

> "[i]n § 1983 actions, an individual cannot be held liable unless he caused or participated in constitutional deprivations. Merely being a supervisor is not enough. *Zimmerman v. Tribble*, 226 F.3d 568, 574 (7th Cir. 2000). Although plaintiffs' allegations do not detail the individual role of each defendant, the

> complaint alleges that all defendants caused or participated in the challenged conduct. Therefore, under the liberal notice pleading requirement, plaintiffs' allegations on the surviving counts are sufficient to withstand a motion to dismiss."

Memorandum Opinion and Order, *Galdikas v. Fagan*, No. 01 C 4268, 2001 WL 1223539, at *5 (N.D. Ill. Oct. 12, 2001) (Conlon, D.J.); (App. at 45a-46a). Adhering to this ruling, Petitioners alleged the named security guards caused or participated in the challenged conduct. Therefore, under the liberal notice pleading requirement, Petitioners' allegations as to the security guards stated viable causes of action.

Furthermore, there was no prejudice to Respondents because the GSU administration knew of the allegations against the security guards since the inception of the case. Moreover, Respondents understood they were the source of the information as to the identity of those individuals, and were willing to supply that information to Petitioners after the District Court ruled the First Amendment claims would survive Defendants' Motion to Dismiss. Furthermore, counsel for Respondents was willing to accept service for the security guards. Therefore, the District Court erred in denying Petitioners the opportunity to submit an amended pleading with the names of the security guard defendants.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Case No. 02-2210
[Decided September 22, 2003]

JAMES GALDIKAS,)
CATHERINE HANSEN,)
CAROL D. HEDGSPETH, et al.,)
Plaintiffs-Appellants,)
)
v.)
)
STUART I. FAGAN,)
PAULA WOLFF, HARRY KLEIN, et al.,)
Defendants-Appellees.)
)

JUDGES: Before Hon. KENNETH F. RIPPLE, Circuit Judge, Hon. DANIEL A. MANION, Circuit Judge, Hon. TERENCE T. EVANS, Circuit Judge.

ORDER

Upon consideration of the Plaintiffs-Appellants' petition for rehearing *en banc,* filed on August 29, 2003, no judge in

active service[1] has requested a vote thereon and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing *en banc* is hereby DENIED.

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[1] Chief Judge Joel M. Flaum and The Honorable Ilana D. Rovner did not participate in the consideration of the petition for rehearing en banc.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Case NO. 02-2210
[Decided August 15, 2003]

JAMES GALDIKAS,)
CATHERINE HANSEN,)
CAROL D. HEDGSPETH, et al.,)
Plaintiffs-Appellants,)
)
v.)
)
STUART I. FAGAN, PAULA WOLFF,)
HARRY KLEIN, et al.,)
Defendants-Appellees.)
)

JUDGES: Before RIPPLE, MANION and EVANS, Circuit Judges.

OPINION

RIPPLE, Circuit Judge. The plaintiffs, a group of former graduate students in the Master of Social Work ("MSW") program at Governor's State University ("GSU"), brought this action pursuant to 42 U.S.C. § 1983 against various GSU officers and members of the GSU Board of Trustees (collectively, "the defendants") in their individual capacities. They alleged violations of substantive and procedural due

process, as well as conspiracy to prevent the exercise of their First Amendment rights. Finally, they alleged retaliation for the exercise of their First Amendment rights. The plaintiffs also asserted claims under Illinois law for promissory estoppel and fraud. The district court dismissed the plaintiffs' substantive and procedural due process claims with prejudice and granted summary judgment in favor of the defendants on the plaintiffs' First Amendment conspiracy and retaliation claims. The district court also dismissed the plaintiffs' state law claims, but without prejudice. For the reasons set forth in the following opinion, we affirm the judgment of the district court.

I

BACKGROUND

GSU is a public university located in University Park, Illinois. The plaintiffs are former graduate students of the MSW program at GSU. The defendants are various GSU officers and members of the GSU Board of Trustees. The plaintiffs allege that the defendants induced them to matriculate in the MSW program at GSU by knowingly and falsely representing to them that the program was approved for accreditation by the National Council of Social Work Education ("NCSWE").[1] According to the complaint, the MSW program was never approved for accreditation by NCSWE, and the defendants took no steps to ensure that the program would gain accreditation. The defendants hired

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[1] Graduates of unaccredited social work programs are not eligible to become licensed social workers in Illinois. However, in August 2001, the Illinois Legislature suspended for several years the requirement that applicants for a social work license graduate from an accredited program.

unqualified faculty members and maintained an inadequate curriculum, knowing that such decisions would prevent the MSW program from gaining accreditation. Between 1997, when the program was instituted, and 2000, the MSW program was denied accreditation on at least two occasions. In November of 2000, GSU representatives informed the students enrolled in the MSW program that NCSWE had denied accreditation candidacy and that the students would be graduating from an unaccredited program. Shortly thereafter, GSU suspended MSW classes.

On December 5, 2000, MSW students, including the plaintiffs, met with GSU President Stuart Fagan to discuss the MSW accreditation issue. Shortly thereafter, President Fagan and GSU Vice President Timothy Arr met and agreed to allow MSW students to attend a board meeting scheduled for December 15, 2000, so that the plaintiffs could voice their complaints. Several MSW students attended the December 15 meeting, and they were permitted to protest with picket signs. Later that evening, several MSW students attended a GSU holiday party, which also was attended by the defendants; some students carried signs and others passed out leaflets protesting the defendants' handling of the MSW accreditation issue.

On January 12, 2001, the defendants held an executive board meeting to discuss the MSW program. During this meeting, the defendants' attorney summarized his research on the MSW accreditation issue, including the possibility of litigation and settlement options.

On January 27, 2001, GSU hosted a series of alumni events, which entailed an alumni town meeting, followed by individual networking receptions for each of GSU's academic departments, and an alumni dinner. The purpose of the

alumni town meeting was to discuss GSU's strategic planning process with alumni, while the purpose of the alumni networking receptions and dinner was to facilitate alumni networking. Featured speakers at the dinner included President Fagan and State Senator Debbie Halvorson.

The GSU Alumni Association created the invitation list for the January 27 events by identifying all GSU graduates as of August 2000, and eliminating any whose addresses were not in zip codes within driving distance. Invitations were mailed in December of 2000, and invitees were asked to return a response card by January 15, indicating which of the events they planned to attend. Although GSU officials initially expected around 250 alumni and guests to attend the events, more than 900 confirmed their attendance.

In preparation for the January 27 events, GSU Director of Public Safety Albert Chesser composed two memos addressed to President Fagan regarding security. In the first memo, dated January 18, 2001, Chesser stated that "campus access will be open and we expect a positive impact in handling the potential protestors and/or disturbances." R.54, Ex.17. In a second memo, dated January 25, 2001, Chesser noted a change in plans. In addition to closing two of the six university entrances and monitoring the remaining four, the memo states that security "will only allow picket signs outside in the vestibule area, but not to stop any flow of guest attendance." R.54, Ex.18. Although both memos were addressed to President Fagan, he denies receiving them, and Chesser recalls sending them to his immediate supervisor, Vice President Arr, rather than to President Fagan.

On the day of the events, the plaintiffs gathered outside of GSU's main entrance in order to protest the defendants' handling of the MSW accreditation issue and to meet with

State Senator Halvorson. Some of the plaintiffs carried picket signs. Security officers informed the plaintiffs that they could picket on the walkway outside of the building, but that they could not bring their picket signs into the building. The plaintiffs were allowed to enter the atrium (without their picket signs) and to converse with registered guests, but they were denied access to other areas of the building, including the library and restrooms. As a result of the restrictions, the plaintiffs claim that they were prevented from attending a previously scheduled meeting with Senator Halvorson.

With the exception of Bruce Friefeld, who arrived after the plaintiffs had disbanded, no member of the Board of Trustees attended the January 27 alumni events. President Fagan, however, was in attendance; at some point during the events, Chesser informed President Fagan of the protest. President Fagan testified that he told Chesser that "the students should be allowed to protest and in no situation whatsoever should there be any physical altercation at all." R.45, Ex.G at 75.

II

DISCUSSION

A. Substantive Due Process

The plaintiffs submit that the district court erred when it granted the defendants' motion to dismiss their substantive due process claim. The plaintiffs submit that the defendants deprived them of a fundamental right to a continuing education. We review a district court's grant of a motion to dismiss de novo. *See Hickey v. O'Bannon,* 287 F.3d 656, 657 (7th Cir. 2002). In doing so, this court must accept all well-pleaded facts alleged in the complaint as true and must draw

all reasonable inferences in favor of the plaintiffs. *See Lachmund v. ADM Investor Servs., Inc.*, 191 F.3d 777, 782 (7th Cir. 1999). Dismissal is proper if it appears beyond doubt that the plaintiffs cannot prove any set of facts entitling them to relief. *See First Ins. Funding Corp. v. Fed. Ins. Co.*, 284 F.3d 799, 804 (7th Cir. 2002).

In *Washington v. Glucksberg*, 521 U.S. 702, 138 L. Ed. 2d 772, 117 S. Ct. 2258, 117 S. Ct. 2302 (1997), the Supreme Court identified two controlling features of substantive due process:

> First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, we have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial guideposts for responsible decision-making that direct and restrain our exposition of the Due Process Clause.

Id. at 720-21 (internal quotation marks and citations omitted).[2] In keeping with the analytical pattern mandated by

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[2] Applying this standard, the Supreme Court held that the asserted right to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause and, therefore, the state's ban on assisted suicide was constitutional because it was rationally related to a legitimate government interest. *See Washington v. Glucksberg*, 521 U.S. 702, 728, 138 L. Ed. 2d 772, 117 S. Ct. 2258, 117 S. Ct. 2302 (1997).

Glucksberg, we first must identify carefully the interest that the plaintiffs claim to be constitutionally protected. Then we must determine whether our "Nation's history, legal traditions and practices" permit our characterizing that interest as fundamental. In this process, we must adhere to existing precedent of the Supreme Court and of this court.

As the district court noted, the right asserted by the plaintiffs is best described as the right to an accredited graduate school education. Neither the Supreme Court nor this court has recognized education as a fundamental right. The opportunity to receive a post-secondary education from an accredited graduate school program certainly has not received such recognition. Indeed, in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973), the Supreme Court expressly declined the invitation to hold that education is a fundamental right under the Due Process Clause. The Court took the view that education is "not among the rights afforded explicit protection" under the Constitution and that it could not "find any basis for saying it is implicitly so protected." *Id.* at 34. Relying on *Rodriguez*, this court recently stated in *Dunn v. Fairfield Community High School District No. 225*, 158 F.3d 962, 966 (7th Cir. 1998), that, "although students may have some substantive due process rights while they are in school, education itself is not a fundamental right." (internal citations omitted).

The Supreme Court has not overruled *Rodriguez*. It is the governing precedent. Nevertheless, the plaintiffs attempt to avoid the clear import of *Rodriguez* by contending that the Supreme Court presumed the existence of a constitutionally protected right in a university student's continued enrollment in a public institution in *Regents of the University of Michigan v. Ewing,* 474 U.S. 214, 88 L. Ed. 2d 523, 106 S. Ct. 507

(1985), and in *Board of Curators of the University of Missouri v. Horowitz,* 435 U.S. 78, 55 L. Ed. 2d 124, 98 S. Ct. 948 (1978). The plaintiffs' reliance on these cases is misplaced. The Court in *Ewing* and *Horwitz* merely "assumed, without deciding, that federal courts can review an academic decision of a public educational institution under a substantive due process standard." *Ewing,* 474 U.S. at 222; *see also Horowitz,* 435 U.S. at 91-92. In neither case did the Court affirmatively recognize a substantive due process right in a student's continued enrollment in a public institution. Indeed, in both *Ewing* and *Horowitz,* the Court expressly stated that it would not reach the issue of whether the plaintiff's assumed property interest gave rise to a substantive right under the *Due Process Clause* because the plaintiff's claim failed even if the Court were to assume such a right. *See Ewing,* 474 U.S. at 223 (holding that, even if a student's assumed property interest in a six-year program of study culminating in an undergraduate degree and a medical degree "gave rise to a substantive right under the Due Process Clause to continued enrollment free from arbitrary state action, the facts of record disclose no such action"); *Horowitz,* 435 U.S. at 91-92 (holding that, even if courts can review an academic decision of a public educational institution under substantive due process, the plaintiff's claim would fail because the defendants' conduct was not arbitrary and capricious); *see also Akins v. Bd. of Governors of State Colls. & Univs.,* 840 F.2d 1371, 1375 (7th Cir. 1988) (noting that neither the Supreme Court nor the Seventh Circuit has recognized that a student at a state-supported university has a substantive due process right to continued enrollment), *vacated on other grounds by Bd. of Governors of State Colls. & Univs. v. Akins,* 488 U.S. 920, 102 L. Ed. 2d 319, 109 S. Ct. 299 (1988).

The plaintiffs' submission fares no better when it is characterized as a display of arbitrary government action that deprived the plaintiffs of their asserted interest in obtaining a degree from an accredited post-secondary institution. In their view, the alleged action of the defendants shocks the conscience and therefore constitutes the sort of egregious executive action that the substantive component of the Due Process Clause is designed to prevent.

In *County of Sacramento v. Lewis,* 523 U.S. 833, 845, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998), the Supreme Court, in elaborating on the particular substantive due process concerns that ought to be addressed by a court in assessing executive action, noted that the cornerstone of due process is protection against government power arbitrarily and oppressively exercised. The Court emphasized that "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *Id.* at 846 (internal quotation marks omitted). The Court then defined such constitutionally cognizable conduct as that which "shocks the conscience." *Id.*[3] Elaborating on this standard, the Court stated that

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[3] As noted by many courts and commentators, the majority opinion in *Lewis* leaves a number of questions unresolved. The principal ambiguity is whether the "shocks the conscience" standard replaces the fundamental rights analysis set forth in *Glucksberg* whenever executive conduct is challenged or whether the "shocks the conscience" standard supplements or informs the *Glucksberg* paradigm in such situations. Certain language in the majority opinion in *Lewis* suggests that the "shocks the conscience" standard should be applied as an antecedent or threshold inquiry in all cases of executive conduct. *See County of Sacramento v. Lewis,* 523 U.S. 833, 847-48 n.8, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998). Other passages suggest that the "shocks the conscience" inquiry may be employed to inform the historical inquiry into the nature of

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the asserted liberty interest. *See id.* Justice Kennedy, joined by Justice O'Connor, also suggested that a "shocks the conscience" inquiry is best understood as a beginning point in the court's search for whether the executive action in question can be said to have found historical acceptance, or at least tolerance, among traditional executive practices. *See id.* at 856-58 (Kennedy, J., concurring); *see also Hawkins v. Freeman,* 195 F.3d 732, 738-39 n.1 (4th Cir. 1999) (en banc).

This ambiguity has been noted as well in our own earlier cases. For example, in *Khan v. Gallitano,* 180 F.3d 829, 836 (7th Cir. 1999), this court applied the *Glucksberg* fundamental rights analysis to executive conduct, concluding that the specialized "shocks the conscience" analysis applies only in limited circumstances such as high-speed chases or pre-trial detentions. However, the panel then went on to state that it would reach the same conclusion-- that the plaintiff's claim fails-- whether it asked if the defendants' conduct shocks the conscience or if the defendants violated a fundamental right deeply rooted in history and tradition. *See id.* By contrast, in *Armstrong v. Squadrito,* 152 F.3d 564, 570 (7th Cir. 1998), this court read *Lewis* to require a three-part analysis: (1) whether the plaintiff's asserted interest is protected by the Due Process Clause; (2) whether the defendant's conduct offends the standards of substantive due process; and (3) whether the totality of the circumstances shocks the conscience. According to the court in *Armstrong*, "executive conduct does not violate substantive due process-- it does not shock the conscience-- unless it meets all three of the conditions." *Id.* at 571. In *Dunn v. Fairfield Community High School District No. 225*, 158 F.3d 962, 965-66 (7th Cir. 1998), the panel appeared to view *Lewis* and *Glucksberg* as adopting more independent tests for challenges to executive and legislative action.

Our case law on this point seems to reflect a more generally perceived confusion as to the interrelationship of *Lewis* and *Glucksberg*. *See* Matthew D. Umhofer, "Confusing Pursuits: Sacramento v. Lewis and the Future of Substantive Due Process in the Executive Setting," 41 Santa Clara L. Rev. 437 (2001); Robert

"liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process" and that "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Id.* at 849.

We do not believe that the alleged executive action in this case can fairly be characterized as "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Lewis,* 523 U.S. at 848 n.8. The plaintiffs allege that the defendants induced them to enroll in a Master of Social Work program by knowingly and falsely representing to them that the program was approved for accreditation. The plaintiffs further allege that the defendants failed to take the steps necessary to ensure that the program would gain accreditation. According to the plaintiffs, the defendants hired unqualified faculty members and maintained an inadequate curriculum, knowing that such decisions would prevent the MSW program from gaining accreditation. Assuming that these allegations are true, we certainly are

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Chesney, "Old Wine or New? The-Schocks-the-Conscience Standard and the Distinction Between Legislative and Executive Action," 50 Syracuse L. Rev. 981 (2000); "The Supreme Court 1997 Term Leading Cases," 112 Harv. L. Rev. 122, 192-202 (1998).

Resolution of this ambiguity is not necessary to our decision today. For the reasons set forth in the text, the plaintiffs' substantive due process claim fails under any reading of *Lewis*. The Supreme Court has not recognized a fundamental right to education. It certainly has not recognized a fundamental right to a post-secondary accredited degree program. Taking the plaintiffs' allegations that the defendants acted improperly by misleading them about the accreditation status of the MSW program as true, such conduct is not sufficiently egregious to shock the conscience.

sympathetic to the plaintiffs' situation; however, we do not believe that the defendants' alleged conduct is sufficiently egregious to "shock the conscience," as that term has been employed in substantive due process analysis.

Finally, we note further that the plaintiffs' due process claim cannot succeed under the precedent of this circuit because adequate state law remedies are available to them. The plaintiffs' asserted substantive due process interest exists (if at all) only as a matter of state contract law. In *Contreras v. City of Chicago,* 119 F.3d 1286, 1295 (7th Cir. 1997), we stated that, when a plaintiff's substantive due process claim is predicated on the deprivation of a state-created property interest, the plaintiff must show (1) that the state actor's conduct was arbitrary and irrational, and (2) that the state actor committed a separate constitutional violation *or* that state law remedies are inadequate. *See also Centres, Inc. v. Town of Brookfield,* 148 F.3d 699, 704 (7th Cir. 1998); *Strasburger v. Bd. of Educ., Hardin County Cmty. Unit Sch. Dist. No. 1,* 143 F.3d 351, 357 (7th Cir. 1998); *Doherty v. City of Chicago,* 75 F.3d 318, 325-26 (7th Cir. 1996); *Kauth v. Hartford Ins. Co. of Illinois,* 852 F.2d 951, 958 (7th Cir. 1988). We reasoned that such a "disciplined jurisprudence" was necessary in order to not "undermine established Supreme Court precedent requiring plaintiffs complaining of arbitrary deprivations of their property to seek redress through state remedies." *Contreras,* 119 F.3d at 1295 (internal quotation marks omitted).

Assuming, arguendo, that the defendants acted arbitrarily and irrationally, the plaintiffs' substantive due process claim still must fail because there is no independent constitutional violation and state law provides an adequate remedy. The plaintiffs are able to sue the defendants in state court under various state causes of action, including fraud and promissory

estoppel. Accordingly, the district court correctly granted the defendants' motion to dismiss this claim.

B. Procedural Due Process

The plaintiffs next submit that the district court erred by dismissing their procedural due process claim. We review the district court's dismissal of this claim de novo. *See Hickey,* 287 F.3d at 657.

A procedural due process claim requires two principal inquiries: first, whether the plaintiff was deprived of a protected property or liberty interest, and second, whether the plaintiff was deprived of that interest without sufficient procedural protections. *See Doherty,* 75 F.3d at 322. In this case, the parties dispute whether the plaintiffs have a protected property interest in an accredited graduate degree; whether the defendants, as opposed to NCSWE, deprived the plaintiffs of that interest; and whether the deprivation occurred without due process of law.

For purposes of procedural due process, property is "a legitimate claim of entitlement." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). A claim of entitlement is not created by federal law; instead it is "created and . . . defined by existing rules or understandings that stem from an independent source such as state law-- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* Accordingly, property interests "usually arise from rights created by state statutes, state or municipal regulations or ordinances, and contracts with public entities." *Ulichny v. Merton Cmty. Sch. Dist.*, 249 F.3d 686, 700 (7th Cir. 2001); *see also Johnson v. City of Fort Wayne,* 91 F.3d 922, 943 (7th Cir. 1996) (noting that a property interest may

arise from an express or implied contract, as well as a state statute or regulation).

The plaintiffs assert that defendants deprived them of a property interest in an expected degree from an accredited state institution. Illinois courts have not identified clearly a property right in post-secondary education.[4] However, Illinois courts have found that the payment of tuition to an educational institution ordinarily gives rise to an implied contract that the school will award a degree upon the student's satisfaction of the degree requirements established by the school. *See Johnson v. Lincoln Christian Coll.*, 150 Ill. App. 3d 733, 501 N.E.2d 1380, 1384, 103 Ill. Dec. 842 (Ill. App. Ct. 1986) (holding that a student who allegedly completed all the requirements for a diploma but had not been given a diploma stated a cause of action for breach of an implied contract); *Wilson v. Illinois Benedectine Coll.*, 112 Ill. App. 3d 932, 445 N.E.2d 901, 906, 68 Ill. Dec. 257 (Ill. App. Ct. 1983) (stating that a university and its students have a contractual relationship and the terms of the contract are set forth in the university's catalogs). Because a property interest may be derived from an implied contract in some instances, *see Perry v. Sindermann*, 408 U.S. 593, 601-02, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972), and the plaintiffs allege that the

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[4] *See Lee v. Bd. of Trs. of W. Illinois Univ.*, No.98-4038, 2000 WL 14419, at *3 (7th Cir. 2000) ("Without taking a position on whether Illinois law could establish such a property interest, we hold only that these plaintiffs have not met their burden of showing that Illinois law confers a property interest in their continued attendance at WIU."); *Alexander v. Kennedy-King Coll.*, 1990 U.S. Dist. LEXIS 14997, No. 88 C 2117, 1990 WL 179691, at *4 (N.D. Ill. Nov. 2, 1990) ("It is not clear whether, in Illinois, a property interest exists in a degree expected from a public institution of higher education.").

defendants represented to them that they would graduate with an accredited degree upon completion of the program's requirements, the plaintiffs arguably possessed a property interest in an accredited degree.

Assuming that the plaintiffs had a protected property interest in an accredited degree, the next inquiry is whether the plaintiffs' complaint sufficiently alleges that the defendants deprived the plaintiffs of that protected interest. The district court held that the defendants did not work such a deprivation because NCSWE was responsible for making the decision not to grant accreditation. On appeal, the defendants urge this court to affirm the district court's finding, stating that NCSWE's "autonomous accreditation decision, and its impact on the social work program and its graduates, cannot support a claim for procedural due process against the GSU defendants." Appellees' Br. at 22. The plaintiffs, on the other hand, argue that the district court and the defendants misconstrue their allegations; although NCSWE was responsible for approving the accreditation process, the defendants were responsible for ensuring that its programs and faculty were sufficient to qualify for accreditation.

We believe that the plaintiffs' complaint states a sufficient deprivation caused by the defendants. Taking the allegations in the complaint as true, as we must, the defendants induced the plaintiffs to enroll in the MSW program by knowingly and falsely representing to the plaintiffs that the program was or would be approved for accreditation and then took no affirmative steps to ensure that the program would qualify for accreditation.

Because the defendants' alleged conduct was "random and unauthorized," we must focus on whether meaningful post-deprivation remedies exist under state law. *See Hudson v.*

Palmer, 468 U.S. 517, 533, 82 L. Ed. 2d 393, 104 S. Ct. 3194 (1984) ("An unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the *Fourteenth Amendment* if a meaningful post-deprivation remedy for the loss is available."). The answer to this question is yes. The plaintiffs are free to seek a wide variety of relief in state court under numerous legal theories, including common law fraud and promissory estoppel. There is no reason to believe that these potential causes of action do not afford the plaintiffs a meaningful post-deprivation remedy. Although the plaintiffs' complaint alleges that they "had no available state remedies to address the defendants' refusal to provide them with the expected degrees for which they matriculated," this court routinely has held that "such a conclusory allegation is insufficient" to state a procedural due process claim, especially as in this case, when the plaintiffs have "failed to explain why [they] cannot pursue [their] claim in the Illinois state courts."[5] *Doherty,* 75 F.3d at 324.

C. First Amendment Claims

The plaintiffs next submit that the defendants conspired to prevent the plaintiffs from exercising their First Amendment right to protest the defendants' handling of the accreditation process during the January 27 alumni events and that the defendants retaliated against the plaintiffs on that date for previously exercising their right to speak out in opposition to GSU and its administration. The plaintiffs contend that the defendants retaliated against them by preventing them from

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[5] Indeed, we note that the plaintiffs filed a separate lawsuit in Illinois state court following the district court's dismissal of their due process and state law claims.

picketing inside the building and by denying them access to various parts of the building, including the library and restrooms. Following discovery, the district court granted summary judgment in favor of the defendants on the ground that the plaintiffs had failed to offer sufficient evidence that the defendants personally were involved in the decision to restrict the plaintiffs to the atrium without picket signs during the alumni events. We review a district court's grant of summary judgment de novo, construing all facts in favor of the nonmoving party. *See Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846, 854 (7th Cir. 2002). Summary judgment is proper if there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. *See Wainscott v. Henry*, 315 F.3d 844, 848 (7th Cir. 2003).

"Section 1983 creates a cause of action based upon personal liability and predicated upon fault. An *individual* cannot be held liable in a § 1983 action unless he caused or participated in [the] alleged constitutional deprivation." *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir. 1983); *see also Starzenski v. City of Elkhart, 87 F.3d 872, 879 (7th Cir. 1996). Section 1983* "does not allow actions against individuals merely for their supervisory role of others." *Zimmerman v. Tribble*, 226 F.3d 568, 574 (7th Cir. 2000). Instead, "[a] causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary." *Wolf-Lillie*, 699 F.2d at 869.

In this case, the plaintiffs contend that a genuine issue of material fact exists as to whether President Fagan and the individual members of the Board of Trustees conspired to prevent the plaintiffs from exercising their First Amendment rights during the January 27 alumni events.

The evidence relating to the trustees is particularly weak. With the exception of Bruce Friefeld, none of the trustees attended the alumni events, and Friefeld did not arrive until after the plaintiffs had left and the alleged First Amendment violation had taken place. Essentially, the plaintiffs contend that the trustees' participation in the alleged constitutional deprivation may be inferred from their discussion of the accreditation issue during the Board of Trustees' executive meeting on January 12, 2001, and the temporal proximity between that meeting and the events that transpired on January 27. We cannot accept this argument.

The minutes for the January 12 meeting reflect that the defendants' attorney was present and that he "summarized the research he had done regarding the MSW program accreditation issue and informed the Trustees of possible litigation options the students might pursue." R.54, Ex.14. The minutes further reflect that "possible settlement options and the budget implications were discussed" and "the draft of a press release regarding the MSW situation was reviewed." *Id.* The minutes do not reflect that the January 27 alumni events, much less a potential demonstration by the plaintiffs during the events, were discussed. Additionally, each of the trustees submitted to the district court an affidavit attesting that he or she had no involvement in anything that transpired in connection with the alumni events. Based on the evidence submitted by the plaintiffs, a reasonable jury could not infer that the trustees participated in a plan to prevent the plaintiffs' protest. Accordingly, the district court correctly granted summary judgment in favor of the trustees.

We now turn to the plaintiffs' contention that President Fagan conspired to impair their First Amendment rights and

to retaliate against them for having exercised previously their First Amendment rights.[6]

In addition to his presence at the January 12 executive board meeting, the plaintiffs allege that President Fagan was the one who actually articulated the order to prevent the plaintiffs from protesting during the January 27 alumni events. In support of this contention, the plaintiffs offer three pieces of evidence: (1) plaintiff Christy Polaski's testimony that two unidentified security guards told her on January 27 that the building was closed pursuant to President Fagan's instruction; (2) Timothy Arr's testimony that President Fagan had the authority to make the decision that students would not be permitted to enter the building with picket signs; and (3) two security-related memos drafted by Albert Chesser and addressed to President Fagan, which discuss security measures for the January 27 events and the possibility of a MSW protest. We shall examine each of these submissions.

The plaintiffs cannot rely on Polaski's testimony in opposing the defendants' motion for summary judgment because it is inadmissible hearsay. *See Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997) ("Hearsay is inadmissible in summary judgment proceedings to the same extent that it is inadmissible in a trial."). Federal Rule of Evidence 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). Polaski's testimony is that

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[6] In essence, the plaintiffs argue that President Fagan conspired with the trustees in advance of the January 27 alumni events to violate the plaintiffs' First Amendment rights, but they also argue that President Fagan was the one who gave the order during the alumni events to prevent them from protesting.

two unidentified security guards told her that the building was closed pursuant to President Fagan's instruction. The claimed probative value of Polaski's testimony depends entirely on the truth of the security guards' out-of-court statements, *i.e.*, that President Fagan actually gave the instruction to close the building. Accordingly, Polaski's testimony is hearsay and is inadmissible unless an exception to the hearsay rule applies. *See Fed. R. Evid. 802*; *Young v. James Green Mgmt., Inc.*, 327 F.3d 616, 621 (7th Cir. 2003). Because the plaintiffs have not identified an applicable exception to the hearsay rule, we have no occasion to consider the issue further.

The plaintiffs attach more significance to Vice President Arr's testimony than his actual words will allow. When asked who possessed the authority to decide whether students could enter the building with picket signs, Arr testified: "President Fagan could make that decision. The chief executive officer on the campus at any given time could make that decision. I could make that decision. Chief Chesser could make that decision." R.54, Ex.16 at 43. Arr did not testify that President Fagan *alone* had the authority to decide that students could not bring picket signs into the building, nor did Arr testify that President Fagan ever made such a decision. Indeed, when asked whether he knew if a decision had been made to prevent students from entering the alumni events with picket signs, Arr testified that he was unaware of any such decision. *See id.* Accordingly, Arr's testimony provides little evidence of President Fagan's involvement in the alleged constitutional deprivation.

The two security-related memos provide, at most, evidence that President Fagan approved the use of a

reasonable time, place, and manner restriction.[7] Initially, we note that the parties disagree over how we should classify the forum in which the plaintiffs sought to protest. The plaintiffs, of course, argue that GSU qualified as a public forum during the alumni events. The defendants, on the other hand, argue that GSU modified the scope of any public forum it may have designated in the past to create a nonpublic forum during the scheduled events. The defendants point out that the alumni events were controlled events, "featuring invited speakers, invited guests, name tags and formal dinners." Appellees' Br. at 37. We believe that the defendants have provided a far more accurate characterization of the record. Even if we assume the existence of a public forum, however, we believe that the record shows that President Fagan authorized nothing more than a reasonable, content-neutral time, place, and manner restriction.

Even in a public forum the government may impose restrictions on "the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983); *see also Ward v. Rock Against Racism,* 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989); *Clark v. Cmty. for Creative Non-Violence,* 468 U.S. 288, 293, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984).

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[7] Although we assume, arguendo, that President Fagan received the security-related memos, we express some skepticism over whether a reasonable jury could make such a determination. Both memos were addressed to President Fagan; however, President Fagan testified that he did not recall receiving the memos and Chesser attested that he actually provided them to Vice President Arr rather than to President Fagan.

The first security-related memo, dated January 18, 2001, does not indicate the existence of any restrictions on speech. The second memo, dated January 25, 2001, provides only that protestors would not be allowed to bring picket signs inside the building. This restriction was content-neutral, served the significant government interest of crowd control at a scheduled event with 900 registered guests, and left open ample alternative channels of communication, including picketing on the campus walkway outside of the building and speaking to guests inside the building without picket signs. Therefore, the district court properly granted summary judgment in favor of President Fagan on the First Amendment conspiracy claim.

The plaintiffs' final contention is that a genuine issue of material fact exists as to whether President Fagan retaliated against them on January 27, 2001, for previously exercising their First Amendment rights on December 15, 2000.[8]

In rejecting the plaintiffs' First Amendment conspiracy claim, we determined that, at most, the evidence supports the conclusion that President Fagan authorized the use of a reasonable time, place, and manner restriction in conjunction with the January 27 alumni events. However, it is well established that an otherwise lawful action "taken in retaliation for the exercise of a constitutionally protected right violates the Constitution." *DeWalt v. Carter,* 224 F.3d 607, 618 (7th Cir. 2000); *see also Zimmerman,* 226 F.3d at 573 ("Otherwise permissible conduct can become impermissible

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[8] The plaintiffs also assert a retaliation claim against the trustees. However, this claim, like the other First Amendment claim, fails against the trustees because there is no evidence that they played a role in formulating the security arrangements for the January 27 alumni events.

when done for retaliatory reasons."). Therefore, we must determine whether there is sufficient evidence in the record from which a reasonable jury could find that President Fagan retaliated against the plaintiffs for previously exercising their *First Amendment* rights.

"In order to establish a prima facie case of First Amendment retaliation, a plaintiff must demonstrate that (1) his conduct was constitutionally protected; and (2) his conduct was a substantial factor or motivating factor in the defendant's challenged actions." *Abrams v. Walker,* 307 F.3d 650, 654 (7th Cir. 2002) (internal quotation marks omitted). As to the second requirement, a plaintiff cannot prevail, "even if a defendant was brimming over with unconstitutional wrath against a § 1983 plaintiff" unless the plaintiff "establishes that the challenged action would not have occurred but for the constitutionally protected conduct." *Id.* (internal quotation marks omitted). If the plaintiff meets this burden, "the burden shifts to the defendant, who must show by a preponderance of the evidence that he would have taken the same actions even in the absence of the protected conduct." *Id.*

There is no question that the plaintiffs have satisfied the first requirement of their prima facie case. On December 15, 2000, the plaintiffs attended a GSU board meeting and Christmas party where they criticized the University's failure to provide an accredited MSW program. However, the plaintiffs have not created a genuine issue of material fact regarding the second requirement. To establish that the plaintiffs' protected speech was a "motivating factor" in President Fagan's challenged actions, the plaintiffs rely primarily on chronology. The plaintiffs assert that they spoke out on December 15, 2000, that defendant trustees and President Fagan met in executive session and discussed the MSW accreditation issue on January 12, 2001, and that the

plaintiffs were prevented from protesting with picket signs inside the building on January 27, 2001.

Although retaliation may be inferred from chronology in some instances, *see Brady v. Houston Ind. Sch. Dist.*, 113 F.3d 1419, 1424 (5th Cir. 1997); *Johnson v. City of Fort Wayne*, 91 F.3d 922, 939 (7th Cir. 1996), the facts in this case are not sufficient to support such an inference. The evidence shows that President Fagan invited the plaintiffs' speech on December 15, 2000, and that the plaintiffs' protest was peaceful and non-disruptive. These facts, along with the fear of overcrowding on the night of the alumni events, do not lead to an inference of retaliation. Accordingly, summary judgment was properly granted in favor of President Fagan on this claim as well.

D. State Law Claims

Because there are no federal claims remaining, we properly decline to reach the merits of the plaintiffs' state law claims. The district court correctly dismissed the plaintiffs' claims for promissory estoppel and fraud without prejudice.[9]

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[9] Finally, we summarily affirm the district court's decision to dismiss, without prejudice, the plaintiffs' First Amendment claims against certain "unnamed, known security guards" for failure to comply with the requirements of Federal Rule of Civil Procedure 4(m) and the court's subsequent denial of the plaintiffs' motion for leave to amend the complaint to add the previously unnamed security guards. *See Troxell v. Fedders of N. America, Inc.*, 160 F.3d 381, 383 (7th Cir. 1998) (holding that district court did not abuse its discretion in declining to extend time for service of process under Rule 4(m)).

Conclusion

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Case No. 01-C-4628
[Decided Apr. 15, 2002]

JAMES GALDIKAS, ET AL.,)
Plaintiff,)
)
v.)
)
STUART FAGAN, ET AL.,)
Defendant.)
)

JUDGE: Suzanne B. Conlon, United States District Judge.

OPINIONBY: Suzanne B. Conlon

MEMORANDUM OPINION AND ORDER

Plaintiffs are a group of 35 former graduate students in the Masters of Social Work ("MSW") program at Governors State University ("GSU"). Plaintiffs sue GSU officers and members of the GSU Board of Trustees (collectively, "defendants") pursuant to 42 U.S.C. § 1983 ("Section 1983") for violation of their Fourteenth Amendment substantive and procedural due process rights (Counts I and IV), conspiracy to prevent the exercise of their First Amendment rights

(Count II) and retaliation for exercising their First Amendment rights (Count III). Plaintiffs also brought common law claims for promissory estoppel (Count V) and fraud (Count VI). The court previously dismissed Counts I and IV with prejudice and Counts V and VI without prejudice. The court thereafter declined to exercise supplemental jurisdiction over Counts V and VI. Defendants now move for summary judgment on Counts II and III[1] pursuant to Federal Rule of Civil Procedure 56.[2]

BACKGROUND

The following facts are undisputed. On December 5, 2000, Fagan met with students to discuss the denial of accreditation candidacy status for the MSW program. Thereafter, Fagan met with Vice President for Administration and Planning Timothy Arr ("Arr") to discuss the possibility that MSW students would attend the board meeting scheduled

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[1] Plaintiffs Jennifer Foley, Melissa Sullivan and Anika Todd previously dismissed their claims with prejudice. The remaining plaintiffs with claims under Counts II and III are Maria Andorf, Sherry Anicich, Sue Ashmus, Karen Bartmann, Leianne Biehl, Mary Brice, Thelma Cartwright, Ronald Chew, Dan Davis, Bryan Dunlap, Jerri Ganz, Kathleen Hubeck, Jenny Jankowicz, John LaMantia, Eugenie Marco, Delores Mays, Jerry Pierson, Christy Polaski, Amy Skold, Kathryn Stanley, Benita Uti, Amanda Volin, Rhilender Wilson and Debra Wolleck (collectively, "plaintiffs").

[2] In response to defendants' motion for summary judgment, plaintiffs voluntarily withdrew Counts II and III against defendants Paula Wolff and Joan Porche. The remaining defendants are GSU President Stuart Fagan ("Fagan") and members of the GSU Board of Trustees, Harry Klein, William McGee, Kristi DeLaurentiis, Lorine Samuels, Kathleen Field Orr, Jack Beaupre and Bruce Friefeld (collectively, "Board of Trustees").

for December 15, 2000. Fagan and Arr agreed to allow student protestors to attend the meeting. At the board meeting, students, including plaintiffs, were allowed to demonstrate with picket signs. After the meeting, Fagan was approached by students carrying picket signs regarding the MSW accreditation issue. Later that evening, several students carried signs at a GSU holiday party attended by defendants. Plaintiff Sue Ashmus distributed approximately 200 copies of a letter expressing plaintiffs' views on the MSW accreditation issue.

On January 12, 2001, defendants met in executive session to discuss the MSW program. During the meeting, an attorney for GSU summarized his research on the MSW accreditation issue, including the possibility of litigation. Defendants discussed the budgetary impact of various settlement options.

Fagan and the University Strategic Planning Committee scheduled a town meeting on January 27, 2001 at the GSU Center for Performing Arts Theater to obtain input from alumni regarding the future of GSU. The GSU Alumni Association scheduled a dinner to follow the town meeting, including separate receptions for the various GSU colleges and the Board of Governors. Illinois state senator Debbie Halvorson and Cook County Commissioner Jerry Butler were scheduled to speak at the dinner.

In preparation for the January 27, 2001 event, Department of Public Safety ("DPS") Director Albert Chesser ("Chesser") sent a memorandum addressed to Fagan regarding security. In the January 18, 2001 memorandum, Chesser stated "Campus access will be open and we expect a positive impact in handling the potential protestors and/or disturbances." Plaintiffs' 56.1 Statement of Facts ("Pl.

Facts") P 92. On January 25, 2001, Chesser sent a second memorandum addressed to Fagan regarding security, stating "There will not be any protestors allowed with posters/picket signs within the town hall meeting," "No picket signs will be allowed in the receptions," "DPS staff will be assigned to the various college receptions with a concentration on the College of Education (MSW concern)" and "DPS will only allow picket signs outside in the vestibule area, but not to stop any flow of guest attendance." Pl. Facts P 93. Fagan denies receiving both memoranda. Chesser recalls sending the memoranda to his supervisor Arr, rather than to Fagan.

On January 27, 2001, plaintiffs congregated at the front entrance to the Theater; some carried signs. According to plaintiffs, they could not bring their signs into the Theater lobby and they could not access other areas of the building, including the bathrooms or the library. As a result of the restrictions, plaintiffs claim they were unable to attend a previously scheduled meeting with Senator Halvorson. Plaintiffs disbanded at approximately 5:00 p.m.

Fagan was present at the January 27, 2001 event. Sometime during the afternoon, Chesser approached Fagan to inform him of the protest. Fagan told Chesser that he "was sympathetic to allowing the students to protest. I was always an advocate of free speech, and the students should be allowed to protest and in no situation whatsoever should there be any physical altercation at all." Defendants' 56.1 Statement of Facts ("Def. Facts") P 10. Friefeld, who was the only member of the Board of Trustees to attend the January 27, 2001 event, did not arrive until 6:15 p.m.

DISCUSSION

I. Standard of Review

Summary judgment is appropriate when the moving papers and affidavits show there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). Once a moving party has met its burden, the non-moving party must go beyond the pleadings and set forth specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Silk v. City of Chicago,* 194 F.3d 788, 798 (7th Cir. 1999). The court considers the record as a whole and draws all reasonable inferences in the light most favorable to the party opposing the motion. *Bay v. Cassens Transport Co.,* 212 F.3d 969, 972 (7th Cir. 2000). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *Insolia v. Philip Morris, Inc.,* 216 F.3d 596, 599 (7th Cir. 2000).

II. Section 1983

Plaintiffs claim defendants, in their individual capacities, conspired to prevent them from exercising their First Amendment rights at the January 27, 2001 event. "An individual cannot be held liable in a § 1983 action unless he caused or participated in [the] alleged constitutional deprivation." *Starzenski v. City of Elkhart,* 87 F.3d 872, 879 (7th Cir. 1996). Defendants argue that plaintiffs cannot prove that defendants caused or participated in the alleged constitutional deprivation on January 27, 2001.

Plaintiffs first claim that "it is believed that Fagan actually articulated the order with respect to excluding plaintiffs from the grounds." Response p. 7. In support of their speculative belief, plaintiffs offer the testimony of Christy Polaski, Sue Ashmus and Maria Andorf. Pl. Response to Def. Facts P 10. Polaski testified that two unknown security guards told her that President Fagan closed the building. *Id.* Polaski's testimony, which is offered to prove the truth of the matter asserted, is inadmissible hearsay that cannot be considered on summary judgment. *See Eisenstadt v. Centel Corp.*, 113 F.3d 738, 741 (7th Cir. 1997).

Nor does the speculative testimony of Ashmus and Andorf constitute evidence that Fagan excluded them from the event. Ashmus testified, "I think I saw Stuart Fagan." Pl. Response to Def. Facts P 10, Ex. 19. Andorf testified, "to my recollection, I think I saw President Fagan in the background talking to the guards." *Id.* at P 10, Ex. 20. Fagan speaking to the security guards during the event does not support a reasonable inference that Fagan exercised his authority to restrict plaintiffs' demonstration. Indeed, Andorf testified that she observed Fagan talking to guards *after* she was excluded from the event for carrying a sign. *Id.* Fagan testified that he spoke to Chesser during the protest, telling him that plaintiffs should be allowed to protest. Based on the undisputed evidence, a reasonable jury could not conclude that Fagan exercised his authority to exclude plaintiffs from the January 27, 2001 event. *See Gorbitz v. Corvilla, Inc.*, 196 F 3d 879, 882 (7th Cir. 1999)(plaintiffs' speculation is "not a sufficient defense to a summary judgment motion").

Plaintiffs next claim that defendants' participation in the alleged constitutional violation can be inferred from defendants' discussion of the MSW accreditation issue during several executive sessions. Pl. Resp. to Def. Facts PP 10-12.

However, plaintiffs fail to provide evidence showing that defendants discussed anything other than the MSW accreditation issue, including plaintiffs, plaintiffs' demonstrations or the January 27, 2001 event. "[A] claim of conspiracy cannot survive summary judgment if the allegations are vague, conclusionary and include no overt acts reasonably related to the promotion of the alleged conspiracy." *Admunsen v. Chicago Park District,* 218 F.3d 712, 718 (7th Cir. 2000). A reasonable jury could not infer defendants conspired to suppress plaintiffs' First Amendment rights based on their discussions of the MSW accreditation issue.

Finally, plaintiffs claim that defendants' participation in the alleged constitutional violation can be inferred from Chesser's memoranda to Fagan. Pl. Resp. to Def. Facts PP 10-12. However, the memoranda show that Chesser, rather than defendants, made the security decisions, including the decision to exclude picket signs. Plaintiffs have not offered any evidence that defendants were personally involved in the decision to restrict plaintiffs to the lobby without picket signs. Summary judgment is appropriate on plaintiffs' Section 1983 claims. *See Zimmerman v. Tribble,* 226 F.3d 568, 574 (7th Cir. 2000)("Section 1983 does not allow actions against individuals merely for their supervisory role of others").

CONCLUSION

Plaintiffs have failed to raise a disputed issue of any material fact. Defendants are entitled to judgment as a matter of law on all claims advanced by plaintiffs.

April 15, 2002

ENTER:

Suzanne B. Conlon
United States District Judge

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered for defendants Stuart Fagan, Harry Klein, William McGee, Kristi DeLaurentiis, Lorine Samuels, Kathleen Field Orr, Jack Beaupre, Bruce Friefeld, Paula Wolff and Joan Porche and against plaintiffs James Galdikas, Catherine Hansen, Carol Hedgpeth, Ernestine Johnson, Sandra Posluszny, Jackie Sharp, Dianna Waters, Geosina Ross, Maria Andorf, Sherry Anicich, Sue Ashmus, Karen Bartmann, Leianne Biehl, Mary Brice, Thelma Cartwright, Ronald Chew, Dan Davis, Bryan Dunlap, Jerri Ganz, Kathleen Hubeck, Jenny Jankowicz, John LaMantia, Eugenie Marco, Delores Mays, Jerry Pierson, Christy Polaski, Amy Skold, Kathryn Stanley, Benita Uti, Amanda Volin, Rhilender Wilson and Debra Wolleck on all claims. All other claims are dismissed pursuant to prior orders.

Date: 4/15/2002

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Case No. 01-C-4268
[Decided Oct. 10, 2001]

JAMES GALDIKAS, et al.,)
Plaintiff,)
)
v.)
)
STUART FAGAN, et al.,)
Defendant.)
)

JUDGES: Suzanne B. Conlon, United States District Judge.

OPINIONBY: Suzanne B. Conlon

MEMORANDUM OPINION AND ORDER

Plaintiffs are a group of 35 graduate students at Governor's State University ("GSU") in University Park, Illinois. Defendants are GSU officers and Board of Trustees. Plaintiffs also sue seven unnamed GSU security guards, who must be dismissed without prejudice pursuant to Rule 4(m), Federal Rules of Civil Procedure. Plaintiffs allege violations of their Fourteenth Amendment rights of substantive (Count I) and procedural due process (Count IV), their First

Amendment right of free speech (Counts II and III), promissory estoppel (Count V), and common law fraud (Count VI). Defendants move to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1).

BACKGROUND

For purposes of a motion to dismiss, the court accepts all well-pleaded allegations in the complaint as true and draws all reasonable inferences in favor of the nonmoving party. *Stachon v. United Consumers Club, Inc.*, 229 F.3d 673, 675 (7th Cir. 2000).

A. The Parties

Plaintiffs were at all relevant times enrolled in GSU's graduate school of social work education ("graduate program"). GSU is a public, state run institution. Defendant Stuart Fagen is the current president of GSU. Defendant Paula Wolfe was GSU's previous president until Fagen succeeded her in August 2000. Defendants Harry Klein, Nathan McGee, Kristi DeLaurentis, Lorine Samuels, Kathleen Field Orr, Jack Beaver and Bruce Friefeld were at all relevant times members of the Board of Trustees. Defendant Joan Porche was acting chair of the graduate program. Defendant Jesse McDonald was Director of the Department of Children and Family Services, an agency of the State of Illinois. All defendants are sued in their individual capacities only.

B. Facts

Plaintiffs claim that defendants induced them into matriculating into GSU's graduate program by falsely

advertising that the program was approved for accreditation by the National Council of Social Work Education. Graduates of unaccredited programs are unable to become licensed social workers in Illinois. Plaintiffs allege that defendants knew the program was not to be accredited but continuously asserted that the program was approved or would be approved to gain accreditation. Plaintiffs also claim that defendants took no steps to gain accreditation, hired unqualified people into the program, and maintained an inadequate curriculum knowing that such practices would result in the program remaining unaccredited.

The program was denied accreditation on at least two occasions between 1997 and 2000. On or about November 2000, GSU informed students in the graduate program for the first time that they would be graduating from an unaccredited degree program and thus would not be able to sit for the licensure examination. Sometime thereafter, defendants terminated the graduate program, including clinical courses.

On approximately January 29, 2001, defendants sponsored a fund raising event at GSU to honor former graduates and to raise funds at a scholarship dinner. Plaintiffs were invited to the event and some plaintiffs paid for admission to the scholarship dinner. Plaintiffs appeared at GSU to peacefully protest the actions complained of in this lawsuit with pickets and signs. Because of the attempted protest, defendants had plaintiffs removed from GSU grounds, canceled academic classes in which plaintiffs were enrolled, closed the library, and prevented plaintiffs from reentering the grounds to attend the scholarship dinner.

DISCUSSION

I. Motion to Dismiss Standard

The purpose of a motion to dismiss is to test the sufficiency of the complaint and not the merits of the lawsuit. *Weiler v. Household Fin. Corp.*, 101 F.3d 519, 524 n.1 (7th Cir. 1996). In examining a motion to dismiss, the court must accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Lachmund v. ADM Investor Servs., Inc.*, 191 F.3d 777, 782 (7th Cir. 1999). A complaint should be dismissed only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)).

II. Substantive Due Process Claim

Plaintiffs contend that defendants deprived them of a property interest in an education in violation of the Fourteenth Amendment substantive due process clause. Defendants contend this claim fails because plaintiffs do not have a fundamental right to an accredited graduate school education.

The substantive due process clause protects against "government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (U.S. 1997). When performing a substantive due process analysis, the court must narrowly formulate the asserted constitutional right. After formulating the asserted right, the court must ask whether it is "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither

liberty nor justice would exist if [it was] sacrificed." *Id. at 720-21* (citations omitted).

The asserted right at issue here is the right to an accredited graduate school education. "Although students may have some substantive due process rights while they are in school, education itself is not a fundamental right." *Dunn v. Fairfield Cmty. High Sch. Dist. No. 225,* 158 F.3d 962, 966 (7th Cir. 1998). Moreover, it cannot be argued that the right to an accredited graduate school education is deeply rooted in this nation's history and traditions. Therefore, the right to an accredited graduate school education is not a fundamental right or liberty interest protected by the substantive due process clause. Plaintiffs also argue that defendants' conduct "shocks the conscience." But the specialized "shocks the conscience" analysis is not applicable here. That analysis applies only in limited circumstances, such as high-speed police chases. The fundamental rights analysis is generally applicable to all substantive due process claims. *Khan v. Gallitano,* 180 F.3d 829, 836 (7th Cir. 1999). Accordingly, plaintiffs' substantive due process claim must be dismissed with prejudice.

III. First Amendment Conspiracy Claim

Plaintiffs claim that defendants engaged in a conspiracy to deprive plaintiffs of their First Amendment right to protest. Defendants contend this claim fails because the scholarship dinner was a non-public forum and defendants' actions were reasonable, viewpoint-neutral restrictions on speech. However, even if defendants' argument is correct, they fail to recognize that the complaint alleges plaintiffs were not just excluded from the scholarship dinner. Plaintiffs were removed from the GSU campus. Comp., P 33.

The extent to which a state institution may restrict speech depends on the nature of the forum. If the forum is public, exclusion is permitted only if it is necessary to achieve a compelling state interest and the exclusion is narrowly tailored to meet that interest. If the forum is nonpublic, the exclusion must be reasonable and viewpoint neutral. *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985). GSU is a state institution and its campus may be considered a public forum. Even assuming the campus is a non-public forum, plaintiffs may be able to show that removing them from the campus was an unreasonable, overly broad, viewpoint based suppression of speech that violated their First Amendment rights. Under liberal notice pleading, "[a] suit should not be dismissed if it is possible to hypothesize facts, consistent with the complaint, that would make out a claim." *Graehling v. Village of Lombard, Ill.*, 58 F.3d 295, 297 (7th Cir. 1995).

Alternatively, defendants argue they are protected by the doctrine of qualified immunity that protects officials from liability if their conduct did not violate clearly established rights obvious to a reasonable person. *Khuans v. Sch. Dist. 110,* 123 F.3d 1010, 1013 (7th Cir. 1997). Plaintiffs may be able to show that defendants violated their clearly established First Amendment rights. For example, plaintiffs may be able to offer evidence showing defendants conspired to unreasonably restrict plaintiffs' access to the campus in order to suppress their viewpoints. Therefore, the issue of qualified immunity is premature. Accordingly, defendants' motion to dismiss piaintiffs' First Amendment conspiracy claim must be denied.

IV. First Amendment Retaliation Claim

Plaintiffs allege defendants excluded them from GSU's campus, canceled academic classes in which they were

enrolled, and closed the library in direct response to their attempted protest. Defendants move to dismiss this claim as conclusory.

In order to establish a First Amendment claim, plaintiffs must demonstrate that their conduct was constitutionally protected and that their protected conduct was a substantial or motivating factor in the defendants' actions. *Horwitz v. Board of Educ. of Avoca Sch. Dist. No. 37,* 260 F.3d 602, 618 (7th Cir. 2001). Defendants contend that plaintiffs fail to allege facts showing their conduct was protected or that defendants' actions were motivated by plaintiffs' conduct. Plaintiffs' claim is not conclusory. Plaintiffs allege defendants denied them access to the GSU campus, canceled plaintiffs' academic classes, closed the library, and prevented them from attending the scholarship dinner because of plaintiffs attempted protest. Comp., P 33. Plaintiffs allege that their conduct was constitutionally protected by the First Amendment and that defendants' challenged actions were in response to plaintiffs' protected conduct. Comp., P 33, 49. Thus, plaintiffs have provided sufficient factual allegations to state a First Amendment claim.

Alternatively, defendants argue they are protected by the doctrine of qualified immunity. However, as discussed above, plaintiffs may be able to show that defendants violated their clearly established rights by retaliating against them for protesting. Therefore, the availability of qualified immunity must await development of the record.

V. Due Process Claim

Plaintiffs claim that defendants violated their right to due process under the Fourteenth Amendment by knowingly making false representations regarding the accreditation status

of the graduate program. To state a procedural due process claim, plaintiffs must allege that state actors deprived them of a constitutionally protected property interest without due process. *See Easter House v. Felder,* 910 F.2d 1387, 1394 (7th Cir. 1990). Whether a plaintiff has a protected property interest is determined by reference to state law. *Qvyjt v. Lin,* 932 F. Supp. 1100, 1106 (N.D. Ill. 1996). Plaintiffs' claim fails for two reasons. First, even if plaintiffs could establish a protected property interest in an accredited degree, plaintiffs do not allege that defendants deprived them of that right. Plaintiffs allege that the National Council of Social Work Education is responsible for approving the accreditation of graduate programs, not defendants. Comp., P 19, 29. Second, the complaint does not allege deprivation of property without due process. Due process means "some kind of notice and ... some kind of hearing" provided by the state before the state deprives a person of property. *Goss v. Lopez,* 419 U.S. 565, 579, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975). But plaintiffs do not allege that they were denied a hearing. Rather, they allege defendants committed fraud by falsely representing that the graduate program would be accredited. Courts should "avoid turning the Fourteenth Amendment into a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Easter House,* 910 F.2d at 1404. Accordingly, plaintiffs due process claim must be dismissed with prejudice.

VI. Promissory Estoppel Claim

Plaintiffs' next claim is based on the doctrine of promissory estoppel. Plaintiffs must establish: (1) an unambiguous promise; (2) reasonable and justifiable reliance on the promise; (3) the reliance must have been expected and foreseeable by the promisor; and (4) injury. *Fischer v. First Chicago Capital Mkts., Inc.,* 195 F.3d 279, 283 (7th Cir.

1999). Plaintiffs' allegations fail to establish an unambiguous promise.

Plaintiffs allege defendants falsely promised them that the graduate program would be accredited. Comp., P 14. But the complaint does not allege who made these promises or by what method they were made. Moreover, the complaint describes the content of the purported promises only in vague and general terms. Thus, the allegations fail to establish an unambiguous promise as required under Illinois law. *See Bethany Pharmacal Co. v. QVC, Inc.*, 241 F.3d 854, 861 (7th Cir. 2001) (promissory estoppel claim futile where no unambiguous words of promise or obligation); *State Bank of Standish v. Curry*, 442 Mich. 76, 500 N.W.2d 104, 108 (Mich. 1993) ("the sine qua non of the theory of promissory estoppel is that the promise be clear and definite"). Accordingly, plaintiffs' promissory estoppel claim must be dismissed without prejudice.

VII. Common Law Fraud Claim

Defendants argue that plaintiffs' common law fraud claim should be dismissed because plaintiffs fail to plead fraud with particularity. Federal Rule of Civil Procedure 9(b) requires that "the circumstances constituting fraud . . . be stated with particularity." Thus, the complaint must state "the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated." *Bankers Trust Co. v. Old Republic Ins. Co.*, 959 F.2d 677, 683 (7th Cir. 1992) (citation omitted).

Plaintiffs' complaint fails this test. The content of the communications are only given in vague terms and plaintiffs do not specify the method by which specific

misrepresentations were made. Plaintiffs allege the misrepresentations occurred from September 1997 to December 2000, but do not give any specific dates on which an alleged misrepresentation occurred. Comp., P 22. More importantly, plaintiffs do not identify any specific individuals who made a misrepresentation. Rather, plaintiffs simply assert that defendants as a group made misrepresentations. *See, e.g.*, Comp., P 18, 21. These vague allegations do not meet the particularity requirement of Rule 9(b). *See, e.g., Graue Mill Dev. Corp. v. Colonial Bank & Trust Co. of Chicago,* 927 F.2d 988, 992 (7th Cir. 1991) (affirming dismissal of claim where complaint failed to allege specific content of misrepresentations, or provide the identity of the person making the communications); *A. I. Credit Corp. v. Hartford Computer Group, Inc.,* 847 F. Supp. 588, 597 (N.D. Ill. 1994) (complaint failed particularity requirement where "only the month, not the date, of each communication was given, and no location is mentioned" and the "content of each communication is given only in vague and general terms"). Accordingly, plaintiffs' common law fraud claim must be dismissed without prejudice.

VIII. Other Grounds

Defendants seek dismissal of the entire complaint for failing to allege facts suggesting that defendants individually participated in the challenged conduct. In § 1983 actions, an individual cannot be held liable unless he caused or participated in constitutional deprivations. Merely being a supervisor is not enough. *Zimmerman v. Tribble,* 226 F.3d 568, 574 (7th Cir. 2000). Although plaintiffs' allegations do not detail the individual role of each defendant, the complaint alleges that all defendants caused or participated in the challenged conduct. Therefore, under the liberal notice

pleading requirement, plaintiffs' allegations on the surviving counts are sufficient to withstand a motion to dismiss.

CONCLUSION

Defendants' motion to dismiss is granted in part and denied in part. Counts I and IV are dismissed with prejudice. Counts V and VI are dismissed without prejudice. The motion as to Counts II and III is denied.

October 10, 2001

ENTER:
Suzanne B. Conlon
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case No. 01-C-4268
[Filed 11/20/2001]

JAMES GALDIKAS, et al.,)
Plaintiffs,)
v.)
STUART FAGAN, et al.,)
Defendants.)
)

DOCKET ENTRY

Plaintiff's motion for leave to file a second amended complaint [26-1] is granted in part. Plaintiffs may amend their complaint to add Amanda Volin as a plaintiff and to correct proper name spelling errors in the first amended complaint. The motion to add nineteen new defendants [none of whom were served within the time limits of Fed.R.Civ.P. 4(m)] is denied. The proposed third complaint "dragnets" these proposed defendants without specifying individualized unconstitutional conduct. Therefore, the proposed amendment is both untimely and futile. The proposed amendments of dismissed Counts V and VI do not arise from the same nucleus of operative facts as the comparatively narrow federal claims. Therefore, the court declines to exercise supplemental jurisdiction.

/s/Suzanne B. Conlon

APPENDIX F

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

Case No. 01-C-4268
[Filed 01/04/2002]

JAMES GALDIKAS, et al.,)
Plaintiffs,)
)
v.)
)
STUART FAGAN, et al.,)
Defendants.)
)

DOCKET ENTRY

Plaintiff's motion for reconsideration of the court's ruling denying leave to identify defendant previously named as "unnamed, known security guards" is denied.

/s/
Suzanne B. Conlon

ORDER

Plaintiffs are a group of 35 graduate students at Governor's State University ("GSU") in University Park, Illinois. Defendants are GSU officers and board of trustee members. Plaintiffs allege violations of their Fourteenth

Amendment rights of substantive (Count 1) and procedural due process (Count IV), First Amendment right of free speech (Counts II and III), promissory estoppel (Count V), and common law fraud (Count VI). On October 10, 2001, the court dismissed Counts I, IV, V, and VI. Pursuant to Fed. R. Civ. P. 4(m), the court also dismissed defendants "unnamed, known security guards". On November 20, 2001, the court denied plaintiffs' motion to add nineteen new defendants (all GSU security guards) to this action. The court determined plaintiffs failed to timely serve the security guards pursuant to Fed. R. Civ. P. 4(m). Moreover, the court held plaintiffs failed to plead individualized unconstitutional conduct. Plaintiffs move for reconsideration.

Motions for reconsideration serve a limited purpose, and will be granted only if the moving party presents newly discovered evidence or establishes a manifest error of law or fact. *Oto v. Metropolitan Life*, 224 F.3d 601, 606 (7th Cir. 2000). Manifest error is "the wholesale disregard, misapplication, or failure to recognize controlling precedent." *Id.* Plaintiffs assert they failed to timely identify and serve the unnamed security guards because they were awaiting defendants' interrogatory response. However, plaintiffs filed their complaint on June 7, 2001. Plaintiffs do not assert they attempted to identify the security guards after that date. Instead, plaintiffs rely on an interrogatory requesting the security guards' identity submitted on September 5, 2001, three months after the complaint was filed. Plaintiffs did not request an extension of time for service of the complaint. Instead, plaintiffs waited for defendant's interrogatory response, which they received on October 16, 2001. Furthermore, plaintiffs failed to identify the unnamed security guards in the complaint until they moved for leave to file a second amended complaint on November 8, 2001. Plaintiffs do not demonstrate good cause for their failure to timely serve

the unnamed security guards within 120 days of filing of the complaint. *See Moore v. Miller*, No, 96 C 1347 WL 2695595, at *9 (N.D. Ill. May 12, 1997).

Plaintiffs contend the second amended complaint sufficiently states individualized unconstitutional conduct of the nineteen security guards. Plaintiffs argue the following allegation is adequate.

> Category 1 and Category 2 Defendants ordered Category 2 Defendants to exclude all plaintiffs from the publicly supported grounds of Governors State University, to cause them to cease and desist their protesting and picketing, albeit in a peaceful manner, cancelled academic classes in which plaintiffs were participating, closed the library open to all students enrolled at Governors State University, and excluded plaintiffs from being on the premises, even those who had paid for tickets to attend the ceremony and dinner, all because of the content of their speeches and the fact they were exercising their freedoms under the First Amendment of the United States Constitution.

Mot. Reconsider, Ex. D, Second Amended Compl. at ¶ 32. However, the nineteen security guards are identified as Category 3 defendants. *Id.* at ¶ 8. The above allegation refers to the actions of Category 2 defendants only. Thus, plaintiffs' reliance on that allegation is without merit. In addition, plaintiffs allege: "Categories 1, 2, and 3 Defendants engaged in a conspiracy to deprive Plaintiffs of their First Amendment right to protest defendants' unlawful deprivation of their property interest [.]" *Id.* at ¶ 40. That allegation plainly fails to state individualized unconstitutional conduct of the security guards. *See Zimmerman v. Tribble*, 226 F.3d 568, 574 (7th Cir. 2000); *see also id.* at ¶ 42, 44, 45, 46.

Plaintiffs fail to allege the security guards were personally involved in the deprivation of their constitutional rights. *Gossmeyer v. McDonald*, 128 F.3d 481, 494 (7th Cir. 1997). A complaint adequately states a § 1983 conspiracy where a conspiratorial agreement is plead generally, and facts documenting overt acts in furtherance of the conspiracy are plead specifically. *Ryan v. Mary Immaculate Queen Ctr.*, 188 F.3d 857, 860 (7th Cir. 1999); *Quinones v. Szorc*, 771 F.2d 289, 291 (7th cir. 1985). Plaintiffs' second amended complaint fails to sufficiently plead a First Amended conspiracy claim. Accordingly, the motion to reconsider must be denied.

/s/
Suzanne B. Conlon

APPENDIX G

CONSTITUTION OF THE UNITED STATES OF AMERICA AMENDMENT 1

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 21. CIVIL RIGHTS GENERALLY

§§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory

decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CHAPTER 225. PROFESSIONS AND OCCUPATIONS

CLINICAL SOCIAL WORK AND SOCIAL WORK PRACTICE ACT

225 ILCS 20/9A

Sec. 9A. A person shall be qualified to be licensed as a licensed social worker and the Department shall issue a license authorizing the practice of social work to an applicant who:

(1) has applied in writing on the prescribed form;

(2) is of good moral character, as defined in subsection (2) of Section 9 [225 ILCS 20/9-2];

(3) (a) has a degree from a graduate program of social work approved by the Department; or

(b) has a degree in social work from an undergraduate program approved by the Department and has successfully completed at least 3 years of supervised professional experience subsequent to obtaining the degree as established by rule. If no supervision by a licensed social worker or a licensed clinical social worker is available, then supervised professional experience may include supervision by other appropriate disciplines as defined by rule;

(4) has passed the examination for the practice of social work as a licensed social worker as authorized by the Department; and

(5) has paid the required fees.